

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>VICKIE E. GANSEN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>ST. RAPHAEL HOME HEALTH CARE, INC.</b>	)	Docket No. 1,002,394
Respondent	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INSURANCE COMPANY)</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the June 3, 2002 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

This is a claim for a February 5, 2002 accident and neck injury. On that date, claimant alleges that she injured herself moving a sewing machine. After conducting a preliminary hearing on April 30, 2002, Judge Barnes entered the June 3, 2002 Order, granting claimant's request for benefits.

Respondent and its insurance carrier argue claimant failed to prove that she was injured while working for St. Raphael Home Health Care, Inc. Instead, they argue the evidence suggests claimant was employed by St. Raphael Direct Care, Inc. Finally, they argue the evidence fails to prove that claimant was injured while working for either company. Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for benefits or, in the alternative, remand the claim to the Judge to take additional evidence as to the actual employer.

Conversely, claimant contends the preliminary hearing Order should be affirmed. Claimant argues respondent and its insurance carrier failed to present evidence regarding the distinction between St. Raphael Home Health Care, Inc., and St. Raphael Direct Care,

Inc., and that any such distinction should be the subject of future preliminary hearings, if respondent wishes to pursue that contention.

The only issue before the Board on this appeal is whether claimant sustained personal injury by accident arising out of and in the course of employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

The preliminary hearing Order should be affirmed.

The Board affirms the Judge's finding that claimant injured herself moving a sewing machine while working for the respondent. On February 5, 2002, claimant was working for respondent as a personal care attendant for respondent's client, Darlene Hazen. Claimant's testimony that she moved Ms. Hazen's sewing machine that evening is corroborated by Ms. Hazen. Moreover, the morning of February 6, 2002, claimant telephoned Ms. Hazen and advised that her neck was hurting and that she thought she had injured it moving the sewing machine. Ms. Hazen testified, in part:

She [claimant] worked for me that night, and until the next day when she called me and told me she wasn't going to be here, the next morning she called and said she wasn't going to be here, that she was going to the Emergency Room. I asked her why, and she says, well, that she had hurt herself the prior night by moving the sewing machine, and her neck was injured. And at that time I made a question of, well, why didn't you say something to me about being hurt, and I says, maybe you just slept on your neck wrong or something, and she said, no, I didn't say anything because I didn't feel like at that time that it was anything to worry about, talk about, but then when I got up this morning, I couldn't move my neck or my head or anything, and so I'm going to go to the Emergency Room.<sup>1</sup>

At this juncture of the proceeding and based upon the record compiled to date, the Board concludes it is more probably true than not that claimant injured herself working for respondent, and that her accident arose out of and in the course of employment. The Board is mindful that respondent's Tammy Frock testified that claimant initially told her the injury occurred while moving a sewing machine in the morning of February 6, 2002. But, as indicated above, the Board is persuaded by the sworn testimony of Ms. Hazen that claimant was moving Ms. Hazen's sewing machine the evening of February 5, 2002, and reported the injury the next morning.

---

<sup>1</sup> Deposition of Darlene Hazen, May 6, 2002, at pp. 11 and 12.

Respondent and its insurance carrier's argument that claimant was probably employed by St. Raphael Direct Care, Inc., rather than St. Raphael Home Health Care, Inc., was not raised at the April 30, 2002 preliminary hearing or at the May 6, 2002 deposition of Darlene Hazen. Accordingly, that issue was not before the Judge and, therefore, the Board is unable to consider it for the first time on appeal.<sup>2</sup>

**WHEREFORE**, the Board affirms the June 3, 2002 preliminary hearing Order entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2002.

---

BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

---

<sup>2</sup> See K.S.A. 44-555c(a), which states that the Board's review shall be upon questions of law and fact presented to the administrative law judge.